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You are hereby notified that the Court has entered the following opinion and order:

2014AP2720-CRNM State of Wisconsin v. Tamyra Smith
(L.C. # 2012CF000982)

Before Curley, P.J., Kessler and Brennan, JJ.

Tamyra Smith pled no contest to felony murder, contrary to WIS. STAT. § 940.03 (2011-12).[1] She now appeals from the judgment of conviction. Smith's postconviction/appellate counsel, Thomas J. Erickson, filed a no-merit report pursuant to ***Anders v. California***, 386 U.S. 738 (1967), and WIS. STAT. RULE 809.32. Smith has not filed a response. We have independently reviewed the record and the no-merit report as mandated by ***Anders***, and we

[1] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

conclude that there is no issue of arguable merit that could be pursued on appeal. We therefore summarily affirm.

Smith was charged with committing felony murder while a party to the crime of armed robbery. The complaint alleged that Smith, along with her boyfriend Tommie Hollis, hatched a plan to rob M.B., who was Smith's landlord. Smith told police that while she was with M.B. inside a home located at 4910 N. 49th Street in Milwaukee, Hollis and another individual entered armed with guns. Hollis pointed his gun at M.B. and Smith (who was pretending to be a victim of the armed robbery) and told M.B. to "[g]ive me what you got," at which point M.B. said he did not have anything. Smith was lying on the kitchen floor when she heard Hollis tell M.B. to get up and then instructed M.B. to go into the basement. Smith heard Hollis yelling at M.B. and heard M.B. stating that he did not have anything. Then Smith heard the sound of multiple gunshots and ran to her own home.

A couple days later, police patrolling the area saw that a home at 4910 N. 49th Street was on fire. M.B.'s body was found in the basement. An autopsy revealed that M.B. had suffered post-mortem burns to approximately 77% of his body. The examiner further found that M.B. had suffered twenty-one gunshot wounds caused by eleven gunshots. The examiner concluded that M.B. had died as a result of the gunshot wounds and not as a result of carbon monoxide.

While the court proceedings were underway, Smith's trial counsel moved to have her examined for competency. The circuit court granted the motion, and the examining psychiatrist concluded that Smith was not competent to stand trial but believed that she could be restored to competency if she was treated at one of the state's mental health institutes. The circuit court ordered that Smith be committed for treatment. After ten months, a staff psychiatrist with the

Department of Health Services concluded Smith was competent to proceed to trial. Smith ultimately decided not to challenge the psychiatrist's conclusion that she was competent.

She pled no contest to felony murder. The circuit court accepted Smith's plea and sentenced her to twenty years of initial confinement and thirteen years and nine months of extended supervision.

The no-merit report concludes there would be no arguable merit to assert that: (1) the plea was not knowingly, voluntarily, and intelligently entered; or (2) the circuit court erroneously exercised its sentencing discretion. This court agrees with postconviction/appellate counsel's description and analysis of the potential issues identified in the no-merit report and independently concludes that pursuing them would lack arguable merit. In addition to agreeing with postconviction/appellate counsel's description and analysis, we will briefly discuss the identified issues.

Before doing so, however, we briefly note that the record reveals the circuit court and the parties went to great lengths to ensure that Smith was competent to stand trial. *See* ***State v. Byrge***, 2000 WI 101, ¶31, 237 Wis. 2d 197, 614 N.W.2d 477 ("'Requiring that a criminal defendant be competent has a modest aim: It seeks to ensure that he has the capacity to understand the proceedings and to assist counsel.'") (citation omitted). There would be no arguable merit to an appeal on this basis.

DISCUSSION

A. *Validity of the Plea*

We have considered Smith's no-contest plea and conclude that there is no arguable basis to allege that it was not knowingly, intelligently, and voluntarily entered. *See* ***State v. Bangert***,

131 Wis. 2d 246, 260, 389 N.W.2d 12 (1986); WIS. STAT. § 971.08. She completed a plea questionnaire and waiver of rights form and addendum, which the circuit court referenced during the plea hearing. *See* ***State v. Moederndorfer***, 141 Wis. 2d 823, 827-28, 416 N.W.2d 627 (Ct. App. 1987). The circuit court conducted a plea colloquy addressing Smith's understanding of the plea agreement and the charge to which she was pleading no contest, the penalties she faced, the fact that she could be sentenced up to the maximum, and the constitutional rights she was waiving by entering her plea. *See* § 971.08; ***State v. Hampton***, 2004 WI 107, ¶38, 274 Wis. 2d 379, 683 N.W.2d 14; ***Bangert***, 131 Wis. 2d at 266-72. The circuit court verified that the medications Smith was taking to treat her mental health issues were helping her to think clearly. She confirmed that this was true.

An argument could be made that the circuit court failed to comply with the procedural mandate of WIS. STAT. § 971.08(1)(c), which requires the court, before accepting a guilty plea, to:

> Address the defendant personally and advise the defendant as follows: "If you are not a citizen of the United States of America, you are advised that a plea of guilty or no contest for the offense with which you are charged may result in deportation, the exclusion from admission to this country or the denial of naturalization, under federal law."

See ***State v. Douangmala***, 2002 WI 62, ¶21, 253 Wis. 2d 173, 646 N.W.2d 1 (explaining that § 971.08(1)(c) "'not only commands what the court must personally say to the defendant, but the language is bracketed by quotation marks, an unusual and significant legislative signal that the

statute should be followed to the letter'") (citation omitted).[2] However, to be entitled to plea withdrawal on this basis, Smith would have to show "that the plea is likely to result in [her] deportation, exclusion from admission to this country or denial of naturalization." *See* § 971.08(2). There is no indication in the record that Smith can make such a showing.

Beyond the defective deportation warning, the circuit court's colloquy in conjunction with the plea questionnaire and waiver of rights form and addendum complied with the requirements of ***Bangert*** and ***Hampton*** for ensuring that a plea is knowing, intelligent, and voluntary. There would be no arguable merit to a challenge to the plea's validity and the record discloses no other basis to seek plea withdrawal.

B. *Sentencing*

Next, we turn to sentencing. We conclude that there would be no arguable basis to assert that the circuit court erroneously exercised its sentencing discretion, *see* ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197, or that the sentence was excessive, *see* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975).

At sentencing, the circuit court must consider the principal objectives of sentencing, including the protection of the community, the punishment and rehabilitation of the defendant, and deterrence to others, ***State v. Ziegler***, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76, and it must determine which objective or objectives are of greatest importance, ***Gallion***, 270 Wis. 2d 535, ¶41. In seeking to fulfill the sentencing objectives, the circuit court should

[2] Here, the circuit court stated: "If you're not a citizen, you could be deported or excluded from coming back into the country."

consider a variety of factors, including the gravity of the offense, the character of the offender, and the protection of the public, and it may consider several subfactors. ***State v. Odom***, 2006 WI App 145, ¶7, 294 Wis. 2d 844, 720 N.W.2d 695. The weight to be given to each factor is committed to the circuit court's discretion. *See* ***Gallion***, 270 Wis. 2d 535, ¶41.

In this case, the circuit court applied the standard sentencing factors and explained their application in accordance with the framework set forth in ***Gallion*** and its progeny. The circuit court noted that M.B. had tried to help Smith and her children and yet she had participated in the events that resulted in his death. The circuit court also accounted for the fact that no one could have predicted Smith would have been involved in something like this given that she had no criminal history but pointed out that she should have found a way to distance herself from Hollis. The circuit court expressed its concern regarding Smith's serious history of emotional and mental health problem before concluding that she needed time in confinement to change the path her life had taken. Given the gravity of the offense, the circuit court sentenced Smith to twenty years of initial confinement and thirteen years and nine months of extended supervision. This sentence was well within the fifty-five year maximum that Smith could have received. *See* ***State v. Scaccio***, 2000 WI App 265, ¶18, 240 Wis. 2d 95, 622 N.W.2d 449 ("A sentence well within the limits of the maximum sentence is unlikely to be unduly harsh or unconscionable.").

Counsel does not address it, but we note that the circuit court also required Smith to provide a DNA sample, if she had not previously done so, and pay the related DNA surcharge.[3] Effective January 1, 2014, the statutory authority for the discretionary imposition of the DNA

[3] Specifically at sentencing, the circuit court stated: "You're going to submit to a DNA sample, if you haven't done so already, and pay all the costs associated with that."

surcharge, WIS. STAT. § 973.046(1g), was repealed and § 973.046(1r) was amended to make the imposition of the DNA surcharge mandatory for felonies. *See* 2013 Wis. Act 20, §§ 2353-2355 & 9426. Smith was sentenced on May 14, 2014; however, the underlying crime in this matter was committed on February 6, 2012, before the effective date of the new DNA surcharge statute.

Here, the circuit court's statements do not indicate that the DNA surcharge was imposed because the court believed it was *mandatory*; instead, it appears the circuit court was operating under the prior version of the statute that allowed for the discretionary imposition of the surcharge. Consequently, this case does not present the issue of whether the mandatory DNA surcharges imposed for crimes committed before the effective date of the statutory change violates the ex post facto clause of the Wisconsin and United States constitutions. *See, e.g.*, ***State v. Radaj***, 2015 WI App 50, ___ Wis. 2d ___, ___ N.W.2d ___.

We conclude that the circuit court properly exercised its discretion in imposing the DNA surcharge. One of the factors that we have identified for circuit courts to consider in assessing whether to impose the DNA surcharge is whether the DNA sample was provided in connection with the case so as to have caused DNA cost. *See* ***State v. Cherry***, 2008 WI App 80, ¶10, 312 Wis. 2d 203, 752 N.W.2d 393. This appears to have been at the heart of the circuit court's determination that Smith was to submit a DNA sample, if she had not previously done so, and pay all the costs associated with it.

We conclude there would be no arguable merit to challenging the circuit court's exercise of its sentencing discretion or its imposition of the DNA surcharge.

Our independent review of the record reveals no other potential issues of arguable merit.

Upon the foregoing, therefore,

IT IS ORDERED that the judgment is summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Thomas J. Erickson is relieved of further representation of Smith in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals